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No.85-216

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

FRANK ROA, JR., YVONNE JEAN ROA, Individually And As Guardian Ad Litem for FRANK JOSEPH ROA,
Appellants,

VS.

LODI MEDICAL GROUP, INC., GORDON B. ROGET, M.D., LODI COMMUNITY HOSPITAL,
Appellees.

On Appeal From
The Supreme Court of California

MOTION TO AFFIRM OR DISMISS

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MAY IT PLEASE THE COURT

Appellees Lodi Medical Group, Inc., and Gordon B. Roget, M.D., move that the California Supreme Court's judgment be summarily affirmed, or in the alternative, that the appeal herein be dismissed on the ground that it does not present a substantial federal question.

OPINION BELOW

This is an appeal from a decision of the California Supreme Court rejecting appellants' contentions that California Business and Professions Code Section 6146 denies them due process and equal protection and violates their rights to freedom of speech and to petition the courts for redress of grievances.

SUMMARY OF ARGUMENT

In 1975, in response to a "major health care crisis . . . attributable to skyrocketing malpractice premium costs and resulting in a potential breakdown of the health delivery system," the California Legislature enacted the Medical Injury Compensation Reform Act of 1975 (MICRA). *American Bank and Trust Co. v. Community Hospital,* 36 Cal.3d 359, 372 n. 11, 683 P.2d 670, 678 n. 11, 204 Cal.Rptr. 671, 679 n. 11. *See generally*, Brief of Amicus Curiae, California Hospital Association. Business and Professions Code Section 6146, which limits contingency fees in medical malpractice cases according to a sliding scale, is an integral element of this act. Another important MICRA statute, Civil Code Section 3333.2, was challenged on federal constitutional grounds in an appeal which this court recently dismissed for failure to present a substantial federal question. *Fein v. Permanente Medical Group,* 38 Cal.3d 137, 695 P.2d 665, 211 Cal. Rptr. 368, *appeal dismissed*, 474 U.S. ____ (1985).

Appellant's constitutional attack on Section 6146 is based on the premise that the statute somehow deprives malpractice plaintiffs of legal representation. Section 6146's sliding scale may make an injured patient with less than a "blockbuster" case a more attractive client. It may also operate to the benefit of both the plaintiff and the defendant by reducing the economic incentive to the plaintiff's attorney to take a case to trial which should be settled. There is no evidence, however, that Section 6146 deprives plaintiffs of representation or impinges on First Amendment rights. Appellant's jurisdictional claims, therefore, must fall.

ARGUMENT

I

THE FIRST AMENDMENT DOES NOT DICTATE AN UNRESTRAINED RIGHT TO PAY LEGAL COUNSEL.

Appellants argue that a restraint on a client's freedom to compensate counsel is of First Amendment significance whether or not that restraint will impair advocacy. Jurisdictional statement at 15, 16. This claim was ably answered by the California Supreme Court:

> Although the argument is creative, its logic clearly proves too much, for it would preclude a state from imposing any limitation on attorneys' fees, no matter how unconscionably high such fees might be . . . *Roa v. Lodi Medical Group*, 37 Cal.3d 920, 927 n. 5, 695 P.2d 164, 167 n. 5, 211 Cal.Rptr. 77, 80 n. 5 (1985).

Additionally, the cases from which appellants attempt to fabricate this First Amendment right, *Secretary of State of Maryland v. Joseph H. Munson Co.,* 104 S.Ct. 2839 (1984) and *Buckley v. Valeo,* 424 U.S. 1 (1976), are readily distinguishable. In *Munson* a state statute which prohibited a charity from paying as expenses more than twenty five percent of the funds it raised, was invalidated. There was found to be no necessary connection between fraud on the one hand and high solicitation and administrative costs on the other, and, additionally, that the state's interest in preventing fraud was only peripherally promoted by the statutory limitation and could be served by measures less intrusive. In contrast, the sliding scale established by Section 6146 is a necessary measure to alleviate and avoid a statewide crisis and to ensure equitable compensation for malpractice plaintiffs through the regulation of attorneys fees. There is no indication that the legislature's goal may be achieved by other means.

In *Buckley*, a statute which limited expenditures by political candidates from their own personal funds was found violative of the First Amendment. "It can hardly be doubted," the court noted, "that the Constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for public office". *Buckley, supra*, 424 U.S. at 15. Our case does not involve political expression and, unlike the direct, necessarily detrimental effect of reducing available campaign funds, there has been no demonstration that Section 6146 interferes with malpractice plaintiffs' ability to retain legal representation.

Further, this Court has upheld the validity of limitations such as that imposed by Section 6146 in the recent case of *Walters v. National Assn. of Radiation Survivors*, 105 S.Ct. 3180 (1985). *Walters* held that a veteran's First Amendment rights were not violated by 38 U.S.C. Section 3404(c), which limits attorneys who represent veterans seeking benefits for a service-connected

death or disability to a $10 fee. This Court determined that the present claims process, which allows Veterans Administration claimants to be represented by themselves or by others, provides a sufficient opportunity to make a meaningful presentation. A First Amendment right to pay a surrogate speaker, the Court proclaimed, would attach only in the absence of any meaningful alternative. *Id.*, 105 S.Ct. at 3197. In our case, appellants were permitted to pay their attorney $90,796.00, an amount demonstrably sufficient to enable them to retain counsel, abrogating any need to reach the question of a meaningful alternative. This Court also noted in *Walters* that significant government interests should be "accorded great weight" in determining the validity of a limitation on free speech. *Id.*, 105 S.Ct. at 3197. The governmental interests at stake in California—diverting more of the award to the injured plaintiff and preserving the State's health care delivery system—are of paramount significance and should be accorded such deference.

II

SECTION 6146 CONSTITUTES FAIR AND REASONABLE REGULATION OF THE FEES ATTORNEYS MAY CHARGE

In order to clothe their complaint in constitutional trappings, appellants encourage the notion that this appeal is being taken to address an injustice done to aggrieved plaintiffs. To foster this impression, Appellants characterize Section 6146 as an infringement on patient's rights, a limit on the amount "that a malpractice plaintiff may agree to pay his attorney". To the contrary, Section 6146 is a fair and reasonable effort to regulate an aspect of the practice of law and this appeal is primarily an objection by plaintiff's attorneys to the regulation of their fees.

To a significant degree, the sliding scale imposed by Section 6146 discourages attorneys from subordinating their clients' best interests to self-interest. A fully informed plaintiff would generally be interested in settling cases where liability is uncertain. An attorney, in contrast, may be particularly tempted to take a gamble on an uncertain case where the contingent fee resulting

from a potential "blockbuster" recovery promises to substantially exceed the fee recoverable from a settlement. The attorney is almost always in a better position than the injured patient to risk the possibility of receiving no compensation at all. The temptation to defer settlement is also likely to be encountered where the attorney will receive a larger fee if the case is not settled before trial.

Most importantly, Section 6146 benefits the injured patient. Prior to the enactment of MICRA, the distribution of malpractice awards was recognized as inconsistent with the public objective of fair compensation. Forty six percent of the malpractice premium dollar was associated with legal expenses, while only thirty four percent was received by the plaintiff as compensation for injuries suffered.[1] One of MICRA's purposes, and particularly the purpose of Section 6146, was to divert some of the money being spent on legal expenses to the injured patient. Appellants contend that the sliding scale of Section 6146 so diminishes the fee available to plaintiff's attorneys that personal injury lawyers will no longer accept malpractice cases, effectively denying the plaintiffs access to counsel. This contention flies in the face of a decade of experience with Section 6146 and appellants offer no evidence to support it.

In fact, Section 6146 will not mandate any reduction in the compensation received by the plaintiff's attorney who actually conducts a medical malpractice case. Rather, the oft-criticized practice of paying referral fees is likely to suffer decline. *See generally*, Brief of Amicus Curiae, California Medical Association. Despite convincing arguments that the payment of straight referral fees is detrimental to the best interests of the client,[2]

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[1] (Keene, "California's Medical Malpractice Crisis", *A Legislator's Guide to the Medical Malpractice Issue* (1976) Health Policy Center, Georgetown Univ. and the National Conference of State Legislatures)

[2] Referral fees are detrimental to the client because they drive up the cost of legal services without contributing to the quality of the service. *See*, discussion, *Moran v. Harris*, 131 Cal.App.3d 913, 182 Cal.Rptr. 519 (1982); *Referral Fees: Everybody Does It, But Is It OK?*. A.B.A. J., Feb. 1985, at 40.

California continues to permit such payment, no doubt convinced that a prohibition will be ineffective. (The only other jurisdictions which so permit are Massachusetts, Maine, and Texas). The existence of this system, where plaintiffs' attorneys share fees with others who do no actual work, stands in stark contrast to the medical profession, where referrals are made to appropriate specialists without expectation or acceptance of referral fees. A likely effect of Section 6146 is a reduction in referral fees so the plaintiffs' attorneys can maintain the same high level of compensation. Thus, the proportion of recoveries kept by clients may be significantly increased without an equivalent reduction in the income of the attorneys who actually handle their cases.

On the whole, attorneys who represent clients are likely to lose little from the effects of Section 6146 and injured plaintiffs will probably benefit. Section 6146 may well affect the way the plaintiffs' bar divides settlements and awards; the fact that some patients will keep a larger share is likely to produce a change in referral fee practices. However, fair and reasonable regulation of attorneys' fees is not a denial of the right to representation and is not vulnerable to constitutional attacks.

III

BUSINESS AND PROFESSIONS CODE SECTION 6146 DOES NOT DEPRIVE MEDICAL MALPRACTICE PLAINTIFFS OF REPRESENTATION

In the case at bar, Dr. Roget and Lodi Medical Group settled for policy limits of $500,000. This was achieved after serving a single set of interrogatories and without taking a single deposition. The attorneys fee allowed by the court, and by Section 6146, was $90,794.89.

This case does not demonstrate that Section 6146 discourages competent counsel from taking plaintiffs' medical malpractice cases. To the contrary, this case is significant evidence that Section 6146 offers rewards sufficient to encourage attorneys to accept whatever risks may be involved. This matter was clearly undertaken with full knowledge that Section 6146 was applicable. It is unconvincing for appellants to now assert that potential

rewards are insufficient to attract counsel. In the decade since MICRA's enactment, a decrease in the frequency of claims against physicians and other health care providers occurred only in the year 1976. Since then, the frequency of claims has risen, indicating that counsel have not been discouraged by the statutory limit of their fees.

The limits imposed by Section 6146 are fair and reasonable. For recoveries less than $140,000, plaintiffs' attorneys receive more than the customary one-third fee. For larger recoveries, plaintiffs' attorneys are still guaranteed a substantial fee. There is no indication that the fee limits have caused attorneys to be reluctant to accept these cases. If further experience with Section 6146 indicates a need for adjustment of the schedule, the California Legislature can make those adjustments. Appellants have not presented a constitutional issue.

CONCLUSION

Appellants' thinly veiled offensive against the regulation of their fees should be exposed for what it is. Experience has shown the limitations of Section 6146 to be both fair and reasonable, allowing sufficient attorneys' fees to attract willing counsel. Appellants' First Amendment claims cannot stand in the face of overwhelming evidence that malpractice plaintiffs in California *are* being represented.

The constitutional issues raised in Appellant's Jurisdictional Statement are baseless. The judgment should be summarily affirmed or the appeal should be dismissed.

Dated: October 24, 1985

Respectfully submitted,

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